STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs **Court of Appeals No. 325782**

GARY LEWIS,
Defendant-Appellee.

Lower Court No. 14-006454

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On July 21, 2016, the Court of Appeals vacated defendant's convictions and remanded the matter for a new trial. The Court found that defendant's Sixth Amendment right to counsel was violated where, after continued outbursts in the courtroom, the district court judge excused both defendant and his attorney from the proceedings without obtaining a valid waiver of defendant's right to counsel.[1] Defendant was subsequently found guilty beyond a reasonable doubt in a jury trial, where he was represented by counsel. Writing for the majority, Chief Judge Michael Talbot and Judge Christopher Murray determined that the error was structural and required automatic reversal. Judge Deborah Servitto concurred in the result, but wrote separately.

The People respectfully request that this Honorable Court grant leave to appeal the Court of Appeals decision or, peremptorily reverse the decision and affirm defendant's convictions and sentence.

[1] *People v Lewis*, unpublished opinion, COA #325782 (July 21, 2016).

STATEMENT OF QUESTION PRESENTED

I.

Denial of counsel at the preliminary examination stage does not require automatic reversal where the error is harmless beyond a reasonable doubt. Here, defendant's examination was held without counsel or defendant present, but defendant was represented at trial and found guilty beyond a reasonable doubt. Did the error at defendant's preliminary examination require automatic reversal of defendant's convictions where the error was harmless beyond a reasonable doubt?

The People answer, "No."

The defendant answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "Yes."

STATEMENT OF FACTS

Defendant was charged in counts one and two of the Information with second-degree arson,[2] for the burning of properties located at 20430 Hawthorne and 20514 Hull, in the city of Detroit. In counts three through six, defendant was charged with third-degree arson,[3] for the burning of properties located at 20438 Hawthorne, 20520 Hull, 20527 Russell, and 20502 Greeley, in the city of Detroit.

On March 2, 2014, Lieutenant Matthew Crouch of the Detroit Fire Department was dispatched to a fire at 20502 Greeley, an unoccupied single family dwelling.[4] 11/5, 65, 67, 71. He found a note in front of the house on the porch. 11/5, 75-76. The note was written on a cupboard door. 11/5, 106. He discovered that the cupboard door had been broken off in the attic area. 11/5, 77. He photographed the note and sent it to Lieutenant Dennis Richardson. 11/5, 77. Crouch determined that the fire was incendiary in nature. 11/5, 86-88. The name and phone number for a person by the name of Pieter Folscher were written on the board. 11/5, 55. The Detroit Fire Department contacted Folscher based on the note. 11/5, 55. Folscher told investigators that he knew defendant as an elder at his church. He also told them where defendant lived. 11/5, 56.

On March 2, 2014, Raven Jackson and her husband, Christopher Goward, were at 20514 Hull. They were living there at the time. They were loading their van in the driveway when they noticed defendant walking. Defendant was cursing and swearing. 11/5, 115-116; 122-124. Defendant walked into the abandoned house next door to them, at 20520 Hull. 11/5, 116, 125; 11/6,

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[2]MCL 750.731.

[3]MCL 750.74.

[4]References to the trial court record will be by date/page.

87. A few minutes later, they observed smoke coming from the abandoned house and Jackson called 911. 11/5, 117, 126. The fire spread to their house. 11/5, 118, 135. The fire at 20520 Hull was determined to be incendiary and was the cause of the fire to 20514 Hull. 11/6, 95, 98. Jackson and Goward identified defendant in a photo lineup. 11/5, 119-120; 127-128. Goward identified defendant in court as well. 11/5, 124.

On March 2, 2014, a witness, Ronnie Blanton, was at 20437 Hawthorne taking photos for his job. 11/6, 6. He observed defendant coming out of an abandoned house across the street, located at 20438 Hawthorne. 11/6, 7, 102, 104. Defendant was on his cellphone, yelling. 11/6, 7. Defendant was in the house for approximately five minutes. Approximately 30 seconds after defendant came out, Blanton observed smoke coming from the house. 11/6, 8, 9. Defendant told Blanton that he had a gun and that if Blanton came any closer he would shoot him. 11/6, 8. Blanton asked defendant if he had set the house on fire. Defendant did not answer the question. Then, defendant told him that 20437 Hawthorne was next. 11/6, 9. Blanton went to his truck and began taking photos of defendant. 11/6, 10. The photos were admitted. 11/5, 164. Lieutenant Jamel Mayers, of the Detroit Fire Department, was dispatched to the location along with Richardson and Crouch. Mayers was given the photos. 11/5, 158-161. Mayers was able to obtain information as to which direction defendant went. He and Richardson were able to locate defendant walking westbound on Eight Mile. 11/5, 161-162, 165. As they approached, defendant ran. 11/5, 165. They pursued defendant and placed him under arrest. Defendant was in possession of four cigarette lighters when he was arrested. Both Blanton and Mayers identified defendant in the courtroom. 11/5, 160-162; 11/6, 11, 79-80.

The vacant house at 20438 Hawthorne totally collapsed. 11/6, 102, 105. The fire at 20438 Hawthorne spread to an occupied dwelling next door at 20430 Hawthorne. 11/6, 105, 116. It was determined that the fire at 20438 Hawthorne was intentionally set and that it caused the fire at 20430 Hawthorne. 11/6, 116.

Mayers then proceeded to investigate a fire at 20527 Russell, a vacant dwelling. 11/5, 167. He determined that the fire was incendiary in nature. 11/5, 174. He came into contact with a witness, Mollison Folson. 11/5, 176. Earlier, Folson was shoveling snow on Russell when he observed defendant. Defendant was screaming about a white guy who was raping women. 11/5, 138-139. Folson observed defendant go into the vacant house. Defendant was in the house for approximately 10 minutes. 11/5, 140. Folson went back in his house and,, a couple of hours later, he noticed that 20527 Russell was on fire. Fire trucks arrived to put out the fire. 11/5, 142. Folson gave Mayers a description of the person he had seen going into the vacant house. The description matched defendant. 11/5, 175-176. The cause of the fire was determined to be incendiary. 11/5, 174. Folson was not able to identify defendant in a photo lineup. 11/5, 142. He was able to recognize defendant's voice at defendant's preliminary examination hearing, and that is how he was able to identify defendant in court during the trial. 11/5, 149-152.

On March 17, 2014, defendant appeared before Judge Joseph Baltimore for his preliminary examination. On that date, defendant's court-appointed attorney, Rene Cooper, requested that defendant be evaluated for competency and criminal responsibility. 3/17, 4. The court ordered the evaluation. 3/17, 4. On May 27, 2014, the parties were back in court for a competency hearing and attorney Mark Procida stood in for Rene Cooper on defendant's behalf. 5/27, 3. The Forensic Center found defendant to be competent to stand trial. The criminal responsibility evaluation was

not completed, due to defendant's failure to provide the information needed to conduct the evaluation. Procida stipulated to the findings of the Forensic Center. 5/27, 3-4. Defendant's preliminary examination was scheduled for June 18, 2014.

On June 18, 2014, Cooper indicated to the court that there had been a breakdown in communication between him and defendant, that defendant no longer wanted him as his attorney, and that defendant would not talk to him. Defendant agreed, stating that he had been locked up for almost 4 months and had only seen Cooper one time for two minutes. 6/18, 3-4. Defendant further stated that when he tried to talk to Cooper, Cooper told him "I don't want to hear it." 6/18, 4. The court concluded that there had indeed been a breakdown in communication and appointed attorney Brian Sherer to represent defendant. 6/18, 5. The court told defendant that Sherer would be the last lawyer he would be getting, and that if they could not get along then defendant would have to represent himself. 6/18, 5.

On July 30, 2014, the parties were back in court for defendant's preliminary examination. Attorney Brian Sherer was present. When the court asked defendant to place his name on the record, defendant replied, "I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through with it." 7/30, 3. The court made a record that defendant did not want either of the lawyers that had been appointed to represent him and that the court was going to hold the examination with defendant representing himself. 7/30, 3-4. The court asked Sherer to act as standby counsel. 7/30, 4. The court explained, "It is not reasonable or fair for me to try to force a lawyer to expose his reputation with someone who obviously has demonstrated that he does not desire to have lawyers representing him." 7/30, 5. The court did not comply with

MCR 6.005[5] or go through the *Anderson*[6] factors to establish an unequivocal waiver. Defendant continued making outbursts to the point that he had to be removed from the courtroom. 7/30, 6-9. The court excused Sherer. 7/30, 9. The court continued with defendant's examination in his absence and he was bound over without an attorney present. 7/30, 60.

On October 15, 2014, defendant appeared before Judge David Groner for his arraignment. Sherer was present, with the understanding that defendant was representing himself, and asked the court to allow him to withdraw as counsel. 10/15, 3-4. Defendant stated that he was not representing himself. 10/15, 3. The court then allowed defendant to interview several lawyers and to choose the one he liked best. 10/15, 6-9. Defendant chose to have attorney Robert Slameka represent him. 5/30, 10.

On October 30, 2014, a pretrial was held before Judge Lawrence Talon and defendant was represented by Slameka. 10/30, 3. Defendant's trial was scheduled to begin the following Monday, November 3, 2014. At the pretrial hearing, defendant told the court that he did not want Slameka to represent him either. 10/30, 39-41. Defendant also told the court that he had filed grievances

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[5]Under MCR 6.005, if the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

[6]*People v Anderson*, 398 Mich 361, 367-368 (1976) set forth a 3-factor test to establish a valid waiver: (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

against both Sherer and Slameka and that he had written a letter to the Chief Judge at 36th District Court complaining about Judge Baltimore. 10/30, 29, 32. The court proceeded to hold a hearing under MCR 6.005(D)(1) and complied with the requirements therein. 10/30, 46-56. Defendant indicated that he thought he was being "forced" to represent himself, but when asked if he wanted Slameka to represent him, he told the court, "I don't want Mr. Slameka nowhere around," and "Mr. Slameka's not going to be nowhere around me." 10/30, 18, 45, 55-57. The court stated that it would revisit the issue at the next court date, so that defendant could decide for sure if he wanted to represent himself or if he wanted Slameka to act as back-up. 5/30, 56.

The parties returned to court on the date set for trial, November 3, 2014. Over the weekend, defendant had spoken to attorney Patricia Slomski. Defendant told the court that he wanted the court to remove Slameka from the case and appoint Slomski to represent him. He further stated that he never wanted to represent himself. 11/3, 4-5. The court appointed Slomski and also appointed an investigator to assist her with preparing for trial. 11/3, 6-7.

On November 5, 2014, the parties returned to court to proceed with defendant's trial. Defendant told the court that he did not want Slomski as his attorney, because she had only visited him for ten minutes prior to trial. 11/5, 11. The court again asked defendant if he wanted to represent himself. He stated that he did not. 11/5, 11-12. The court asked if he wanted Slomski to represent him. Defendant replied, "Yes, sir. Go ahead, sir. Yes, sir." 11/5, 12. Slomski represented defendant for the duration of his trial.

Defendant was found guilty of count one, third-degree arson (lesser included offense) at 20430 Hawthorne; count two, second-degree arson at 20514 Hull; count three, third-degree arson at 20438 Hawthorne; count four, third-degree arson at 20520 Hull; and count five, third-degree arson

at 20527 Russell. He was found not guilty of count six, third-degree arson at 20502 Greeley. 11/11, 58. He was sentenced to seventeen to thirty years imprisonment on each of the five counts, to run concurrently. 12/23, 21-22.

On August 31, 2015, defendant filed an appeal of right in the Michigan Court of Appeals. On December 3, 2015, defendant filed a pro-per brief on appeal in the Michigan Court of Appeals. On July 21, 2016, the Court of Appeals issued its opinion, finding that defendant's Sixth Amendment right to counsel was violated where, after continued outbursts in the courtroom, the district court judge excused both defendant and his attorney from the proceedings without obtaining a valid waiver of defendant's right to counsel. The Court of Appeals vacated defendant's convictions and sentences and remanded the matter for a new trial.

In its opinion, the Court stated its conclusion that, because the error was structural in nature, Michigan law requires automatic reversal. The majority went on to say that such an interpretation of federal law is incorrect:

> [W]e express our belief that the denial of counsel at a critical stage of a criminal proceeding does not *always* require reversal. Instead, when confronted with such a situation, a court must determine whether the denial of counsel at a critical stage constitutes a structural error that infects the entire proceedings, and if so, automatic reversal is then required. However, if the denial of counsel at a critical stage does not infect the entire proceedings, then a court must determine whether the denial of counsel at a critical stage constitutes harmless error.

The People now apply to this Supreme Court for leave to appeal the Court of Appeals decision. The People argue that the Court of Appeals should have applied harmless error review, as the error at defendant's preliminary examination did not "infect the entire proceedings " where he was subsequently represented by counsel and found guilty beyond a reasonable doubt in a jury trial.

ARGUMENT

I.

Denial of counsel at the preliminary examination stage does not require automatic reversal where the error is harmless beyond a reasonable doubt. Here, defendant's examination was held without counsel or defendant present, but defendant was represented at trial and found guilty beyond a reasonable doubt. The error at defendant's preliminary examination was harmless and did not require automatic reversal of defendant's convictions.

Standard of review:

A forfeited constitutional claim is reviewed for *plain error*.[7] A nonstructural constitutional error that occurs at the preliminary examination stage is reviewed to determine whether the error was *harmless beyond a reasonable doubt.*[8]

Discussion:

Defendant forfeited his right to counsel by his disruptive behavior. But even if the right to counsel was not forfeited, a denial of counsel at the preliminary examination stage does not require automatic reversal. Rather, the error should be reviewed to determine whether it was harmless.

A. Defendant Forfeited His Right To Counsel By His Disruptive Behavior

Although the right to counsel is constitutionally guaranteed, the right can be forfeited by virtue of a defendant's own actions.[9] In *People v Kammeraad*, the defendant repeatedly disrupted

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[7]*People v Carines*, 460 Mich 750, 774 (1999).

[8]*Chapman v California*, 386 US 18, 24 (1967); *People v Carter*, 412 Mich 214, 217 (1981).

[9]*People v Kammeraad*, 307 Mich App 98, 130-132 (2014).

the court proceedings with his defiant behavior. At his preliminary examination, the defendant stated:

> I take exception. I refuse any and all court appointed attorneys and their services. I refuse any and all trials. I refuse any and all juries. I refuse any and all court services. I take exception to this process. And I take exception to these unlawful proceedings. Have the prosecution swear in and certify the false charges, the fake charges they are holding....I do not trust that man...[T]hat man does not speak for me. I refuse any and all court appointed attorneys, and their services.[10]

The defendant repeated this mantra throughout several pre-trial hearings. At times, the defendant refused to leave his cell to appear in court.[11] At one pre-trial hearing, the circuit court noted that the defendant appeared in court partially naked after having refused to get dressed. He was also in a wheelchair despite not having any physical handicap.[12] The circuit court attempted to obtain a formal waiver of counsel under MCR 6.005, but was unable to do so because the defendant continued to state that he was taking exception to the proceedings. The defendant's appointed counsel expressed that he wanted to withdraw, as the defendant would not even acknowledge his presence.[13] The defendant repeatedly stated that counsel was not his attorney and had no right to represent him.[14]

At the defendant's trial, he was removed from the courtroom due to his behavior. The court did not allow defendant's appointed counsel to withdraw, but counsel declined to cross-examine any

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[10] *Id* at 101-102.

[11] *Id* at 111.

[12] *Id* at 105.

[13] *Id* at 107-108.

[14] *Id* at 110.

of the prosecution's witnesses or present any evidence on behalf of the defendant.[15] After a jury trial, the defendant was convicted as charged.[16] The Michigan Court of Appeals held that despite the ineffective waiver of counsel, the defendant had forfeited his right to counsel by his own willful conduct: "In this case, we conclude that defendant...forfeited his constitutional right to counsel, considering his refusal to accept, recognize, or communicate with appointed counsel, his refusal of self-representation, and his refusal to otherwise participate in the proceedings."[17] In its opinion, the Court acknowledged that a finding of forfeiture could be precluded where a defendant is mentally incompetent.[18] The Court further recognized that a finding of forfeiture should be reserved for the rare circumstance where it is necessary to address a defendant's "exceptionally egregious conduct."[19]

The Court of Appeals based its decision, in part, on precedent from other jurisdictions. For example, in *State v Mee*, the North Carolina Court of Appeals held that the defendant had forfeited his right to counsel where the defendant told the trial court that he did not want representation, did not want to represent himself, and refused to remain in the courtroom or participate in his trial. The Court held that, the "[d]efendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine...that defendant had knowingly, understandingly, and voluntarily waived such right[.]"[20] The Court in *Kammeraad* also noted that in *U.S. v McLeod*, the United

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[15] *Id* at 115.

[16] *Id* at 116.

[17] *Id* at 131-132, 134.

[18] Id at 136 (citing *Indiana v Edwards*, 554 US 164, 177-178 (2008)).

[19] *Id* at 137.

[20] Id at 130-131 (quoting *State v Mee*, 233 NC App 542 (2014)).

States Court of Appeals for the Eleventh Circuit acknowledged that the right to counsel can be forfeited:

> The appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of an accused may be affected. Nonetheless, the right to assistance of counsel, cherished and fundamental as it may be, may not be put to service as a means of delaying or trifling with the court.[21]

Similarly, the Court observed that in *U.S. v Goldberg*, the U.S. Court of Appeals for the Third Circuit approved of a trial court's decision to deprive a defendant of the fundamental right to counsel where the defendant is aware of his actions and what he stands to lose, even where the defendant vehemently objects to being forced to proceed *pro se.* The Court in *Goldberg* referred to this situation as "forfeiture with knowledge."[22]

Here, defendant's behavior was very similar to the defendant in *Kammeraad*. He repeatedly stated that he did not want to represent himself, yet he rejected each of the attorneys the court appointed for him. When the court appointed Sherer to represent defendant, the court warned him that if he could not get along with Sherer, he would have to represent himself. 6/18, 5. Sherer was prepared to represent defendant at his preliminary examination, but defendant stated on the record, "I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through with it." 7/30, 3. The court then determined that defendant would represent himself, since he didn't want Sherer to represent him. Nevertheless, the court asked Sherer to act as standby counsel. But defendant's continued outbursts resulted in him being removed from

[21] *Id* at 132 (quoting *US v McLeod*, 53 F3d 322, 325 (CA 11 1995)).

[22] *Id* at 134 (citing *US v Goldberg*, 67 F3d 1092, 1101 (CA 3 1995)).

the courtroom. At that point, the court excused Sherer and defendant's preliminary examination continued in the absence of counsel.

Here, as in *Kammeraad*, defendant forfeited his right to counsel when he deliberately continued to disrupt the proceedings despite the court's warnings. He was not mentally incompetent to stand trial, as he had been examined and found competent by the forensic center. 5/27, 3-4. Rather, he engaged in the behavior with full knowledge of the consequences of his actions, with the intent to delay and/or disrupt the court proceedings.

Therefore, despite the ineffective waiver of defendant's right to counsel, defendant forfeited his right to counsel by his own willful conduct.

B. The Error Was Not Structural and Harmless Error Analysis Applies

If the error is not deemed forfeited, harmless error analysis nevertheless applies. Where an error affects a constitutional right, courts must first determine whether the error is structural or nonstructural. "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence."[23] Such errors are "intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal."[24]

The U.S. Supreme Court has recognized that a finding of structural error is only appropriate in a "very limited class of cases," and that "most constitutional errors can be harmless."[25] In other

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[23]*People v Watkins*, 247 Mich App 14, 26 (2001).

[24]*People v Duncan*, 462 Mich 47, 51 (2000) (citing *Neder v U.S.*, 527 US 1, 7 (1999)).

[25]*Neder supra*, at 8 (internal quotations and citations omitted).

words, a finding of structural error is the exception, rather than the rule. Generally, an error will not be considered structural unless the effect of the error "pervade[s] the entire proceeding."[26] If the error is nonstructural, harmless error analysis applies.[27]

Defendant relies on the U.S. Supreme Court's decision in *U.S. v Cronic*, for the proposition that a denial of counsel at a critical stage entitles him to a "presumption of prejudice." Defendant asserts, and the Court of Appeals agreed, that *People v Willing*,[28] *People v Buie*[29] (relying on *Willing*), and *People v Arnold*[30] require automatic reversal *whenever* there is a complete denial of counsel at a critical stage of a criminal proceeding. In *Arnold*, this Court held in an order that a complete denial of counsel at a critical stage of a criminal proceeding is a structural error that requires reversal.[31] But *Arnold* involved a deprivation of counsel at sentencing, not at the preliminary examination stage. Here, the denial of counsel occurred at the preliminary examination stage, after which defendant had a fair trial with the representation of counsel.

Willing specifically distinguished the situation where, as here, the deprivation of counsel does not "pervade the entire proceeding."[32] For example, in *Willing*, the Court of Appeals recognized the applicability of harmless error analysis in those cases in which "the evil caused by a Sixth

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[26]*People v Willing*, 267 Mich App 208, 224 (2005).; *Satterwhite v Texas*, 486 US 249, 256-257 (1988).

[27]*Willing*, supra, at 223.

[28]*Id* at 224.

[29]*People v Buie*, 298 Mich App 50 (2012).

[30]*People v Arnold*, 477 Mich 852, 852-853 (2006).

[31]*Id.*

[32]*Willing, supra*, at 224.

Amendment violation is limited to the erroneous admission of particular evidence at trial."[33] Thus, in order to determine if a constitutional error is structural in nature, courts must determine not just whether a complete deprivation of counsel occurred at a critical stage of the proceedings, but "*whether the effect of the deprivation pervaded the entire proceeding.*"[34]

A defendant's preliminary examination is a critical stage for purposes of the Sixth Amendment right to counsel.[35] But, although the right to counsel is guaranteed by the Constitution, the right to a preliminary examination is not.[36] A defendant's right to a preliminary examination is statutory.[37] The primary function of a preliminary examination "is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it."[38] Thus, a preliminary examination "primarily serves the public policy of ceasing judicial proceedings where there is a lack of evidence that a crime was committed or that the defendant committed it."[39]

Contrary to defendant's argument and the Court of Appeals' opinion, Michigan law is not "well established" that automatic reversal is required where a denial of counsel occurs at the preliminary examination stage. In fact, Michigan courts have addressed this issue by adopting the

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[33] *Id*.

[34] *Id* (emphasis added).

[35] *Coleman v Alabama*, 399 US 1, 9-10 (1970).

[36] *People v Hall*, 435 Mich 599, 603 (1990)..

[37] *People v McGee*, 258 Mich App 683, 695 (2003).

[38] *People v Glass*, 464 Mich 266, 277 (2001).

[39] *People v Johnson*, 427 Mich 98, 104-105 (1986).

harmless error standard set forth in *Coleman v Alabama*.[40] In *Coleman*, the U.S. Supreme Court held that, although a defendant's preliminary examination is a "critical stage" for purposes of the Sixth Amendment right to counsel, a denial of counsel at the preliminary examination stage does not require automatic reversal. Rather, "[t]he test to be applied is whether the denial of counsel at the preliminary hearing was harmless error."[41] Harmless error analysis requires a two-part inquiry: "(1) Was the error so offensive to the maintenance of a sound judicial system so as to require reversal? and (2) If not, was the error harmless beyond a reasonable doubt?"[42] If the error is deemed harmless, reversal is not required.[43] In other words, "an error in the preliminary examination procedure must have affected the bindover and have adversely affected the fairness or reliability of the trial itself to warrant reversal."[44]

An error that occurs at the preliminary examination stage, even a constitutional one, will generally be deemed harmless where, as here, there was sufficient evidence to support a bindover and the defendant was subsequently found guilty beyond a reasonable doubt.[45] For example, in *People v Washington*, the defendant was denied counsel at his preliminary examination and was subsequently convicted of kidnapping in a jury trial. The Michigan Court of Appeals held that the

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[40]*People v Humbert*, 120 Mich App 195, 198 (1982); *People v Washington*, 30 Mich App 435, 437 (1971); *Coleman, supra*.

[41]*Coleman, supra,* at 10-11.

[42]*Humbert, supra.*

[43]*Hall*, supra, at 603.

[44]*McGee, supra*, at 698.

[45]*People v Washington*, 30 Mich App 435, 437 (1971).

denial of counsel at the preliminary examination stage was harmless, noting that the victim testified at both hearings and her testimony was believed by both the magistrate and the jury. Further, the witness was subjected to vigorous cross-examination at trial, and no part of the preliminary examination transcript was introduced at trial.[46]

Similarly in *People v Carter*, this Court applied harmless error analysis after finding that the defendant had been denied the right to counsel at his preliminary examination. In *Carter*, this Court found that the defendant had not executed a knowing, voluntary and intelligent waiver of his right to counsel and remanded the matter for a determination as to prejudice.[47]

Here, as in *Washington*, the witnesses who testified at defendant's preliminary examination testified again at trial and were cross-examined. There was sufficient evidence presented at the preliminary examination to establish probable cause to bind defendant over for trial. Even if defendant had been represented by counsel at the preliminary examination, the case would have been bound over. Defendant was represented by counsel at his trial and the jury found him guilty of five counts of arson beyond a reasonable doubt. Defendant conceded at oral argument in the Court of Appeals that no evidence from the preliminary examination was used at trial. He further conceded

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[46] *Id at* 437-438.

[47] *Carter, supra*, at 216-217. See also *People v Dewulf*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 22, 2007 (Docket No. 258148) (Attached as Appendix B). (Citing *Carter* and *Coleman*, the Michigan Court of Appeals held that the defendant was not prejudiced by an ineffective waiver of counsel during his preliminary examination where he was represented by counsel at trial and was able to present his defense, and where no evidence procured at the preliminary examination was used against him at trial).

that he did not waive any rights or defenses by not participating in his preliminary examination.[48] Therefore, defendant was not prejudiced by the denial of counsel at his preliminary examination hearing.

Willing, on the other hand, is distinguishable from the instant case. In *Willing*, the deprivation of counsel occurred during the defendant's pretrial evidentiary hearings, which were his "only opportunities to present his entrapment defense and to argue that his statement to the police should not be admitted."[49]

Although *Washington* and *Carter* were decided prior to the U.S. Supreme Court's decision in *U.S. v Cronic*, they have not been overruled. And, even post-*Cronic*, Michigan courts have followed *Satterwhite v Texas*, which was decided four years after *Cronic*. In *Satterwhite*, the defendant was denied counsel at a critical stage and the U.S. Supreme Court found that the denial constituted a violation of the Sixth Amendment. But the inquiry did not end there: "Our conclusion does not end the inquiry because not all constitutional violations amount to reversible error. We generally have held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand."[50]

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[48]*People v Lewis*, unpublished opinion, COA #325782 (July 21, 2016) (Attached as Appendix A).

[49]*Willing, supra*, at 228.

[50]*Satterwhite, supra*, at 256 (citing *Chapman v California*, 386 US 18 (1967).

For example, in *People v Vinson*, a 2006 unpublished opinion,[51] the Michigan Court of Appeals followed the holding in *Coleman* and applied the harmless beyond a reasonable doubt standard where the defendant was deprived of counsel during the second day of his preliminary examination:

> Although the wrongful deprivation of representation during a critical stage of the criminal process has been held to be structural error requiring automatic reversal, see *United States v. Cronic*, 466 U.S. 648, 659 n 25; 104 S Ct 2039; 80 L.Ed.2d 657 (1984), the United States Supreme Court has held that, where a defendant is completely deprived of representation at a preliminary examination, reversal is not warranted unless the defendant suffered prejudice as a result of the deprivation.[52]

The Court held that the error was harmless beyond a reasonable doubt. In reaching this conclusion, the Court noted that, during the time that the defendant was unrepresented, no substantive evidence was produced that was later used against him at trial. Further, the Court noted that the testimony of the witnesses was sufficient to support the bindover. In other words, defendant would have been bound over even if counsel had been present the entire time.[53]

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[51]*People v Vinson*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 24, 2006 (Docket Nos. 259079 and 259204) (Attached as Appendix C). This case is being cited because there is no published Michigan case post-*Cronic* in which a court has applied harmless error analysis to a denial of counsel at the preliminary examination stage, and because there is an apparent conflict between Michigan law and federal law (MCR 7.215(C)).

[52]*Id* at 4 (citing *Coleman, supra,* at 10-11; *Chapman, supra*; and *Carter, supra* at 217-218).

[53]*Id* at 4.

Similarly, in *People v Wolfe*, a 2009 unpublished opinion,[54] the Michigan Court of Appeals considered the question of whether an ineffective waiver of counsel at a critical stage required automatic reversal. In *Wolfe*, as in the instant case, the trial court failed to obtain a valid waiver of counsel under *People v Anderson* and MCR 6.005(D). As a result, the defendant was left to cross-examine two witnesses in pro per, although he did have standby counsel. The Court found that this was indeed a complete denial of counsel at a critical stage, because standby counsel is not "counsel" within the meaning of the Sixth Amendment.[55]

Nevertheless, the Court in *Wolfe* recognized that *Willing* allows for harmless error analysis in those situations where the ineffective waiver of counsel does not "pervade the entire proceeding."[56] Thus, the analysis does not end with the determination that a defendant has been denied counsel at a critical stage:

> Stated differently, to be deemed a structural error, the deprivation of counsel must be (1) total or complete, (2) at a critical stage of the proceedings, and (3) must contaminate the entire proceeding...In other words, if the evil caused by the Sixth Amendment violation is limited, such that the entire proceeding is not infected by the violation, then application of the harmless error test is appropriate...Such an inquiry necessarily requires us to examine and determine the scope of the error's effect on the proceedings.[57]

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[54]*People v Wolfe*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 8, 2009 (Docket No. 286700) (Attached as Appendix D). This case is being cited because there is no published Michigan case post-*Cronic* in which a court has applied harmless error analysis to a denial of counsel at the preliminary examination stage, and because there is an apparent conflict between Michigan law and federal law (MCR 7.215(C)).

[55]*Id* at 3.

[56]*Id* (citing *Satterwhite, supra*; and *People v Murphy*, 481 Mich 919, 921-923 (2008) (Markman, J., concurring)).

[57]*Id*.

The Court concluded that, because the defendant's ineffective waiver of counsel did not deprive him of any defenses or testimony that could have been used to develop such defenses, the denial of counsel did not constitute structural error. The Court then proceeded to apply harmless error analysis to determine whether, in the context of all the other evidence presented, there was a reasonable possibility that the error contributed to the verdict. The Court ultimately held that there was not, thus the error was harmless beyond a reasonable doubt.

In *People v Murphy*, a 2008 published opinion, Justice Markman, in his concurrence, recognized the "apparent tension" between *Satterwhite* and *Cronic*: "[U]nder *Cronic*, an absence of counsel at a critical stage results in an irrebuttable presumption of prejudice, while under *Satterwhite*, the same may be analyzed for harmless error."[58] Justice Markman is correct that the two cases must be reconciled. *Cronic* seems to require an irrebuttable presumption of prejudice where there is a denial of counsel at a critical stage. But *Satterwhite*, decided four years later, held that automatic reversal is only warranted in "cases in which the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding."[59] Justice Markman recognized, and rightly so, that to require automatic reversal in *every* case where counsel is absent at a critical stage would give no effect to *Satterwhite*. As a solution, Justice Markman suggested that *Satterwhite* be interpreted as carving out an exception to *Cronic:*

> ...[A]s an exception to *Cronic*, *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), indicates that an absence of counsel at a critical stage only requires automatic relief for a defendant if that absence cannot be sufficiently separated from the entire criminal proceedings...That is, a reviewing court should first determine whether the effect of the absence of counsel can be sufficiently

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[58] *Murphy, supra,* at 921-922 (Markman, J., concurring).

[59] *Satterwhite, supra*, at 257.

> separated from the entire proceeding, enabling an appellate court to meaningfully compare the flawed proceeding with an unflawed proceeding. If the effect cannot be sufficiently separated, then defendant is entitled to an irrebuttable presumption of prejudice under *Cronic*; if the effect can be sufficiently separated, then it may be reviewed for harmless error under *Satterwhite*.[60]

Reconciling *Cronic* and *Satterwhite* in this way is consistent with the rationale underlying both cases. It is also consistent with federal precedent. As Justice Markman pointed out, "every federal circuit court of appeals, has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error."[61]

Other jurisdictions have also followed this rationale post-*Cronic* and have applied harmless error review under these circumstances, affirming that *Cronic* was not intended to alter the principle set forth in *Coleman.* In *People v Tena*,[62] the defendant was denied the right of self-representation at his preliminary hearing, but was represented at trial by counsel of his choice. The Court applied harmless error analysis pursuant to *Chapman* and *Coleman.*[63] Similarly in *State v Dennis*,[64] the Supreme Court of New Jersey applied harmless error analysis when the defendant was denied counsel at a probable cause hearing. The defendant in *Dennis* argued that he should be entitled to a presumption of prejudice under *Cronic*. The Court noted that even if the defendant had been represented by counsel at the hearing, it is unlikely that counsel could have prevented the bindover. Further, the witness who testified at the probable cause hearing also testified at trial and was cross-

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[60] *Murphy, supra,* at 919 (Markman, J., concurring).

[61] *Id* at 923 (Markman, J., concurring).

[62] *People v Tena,* 156 Cal App 4th 598 (2007).

[63] *Id* at 613-614.

[64] *State v Dennis,* 185 NJ 300 (2005).

examined, none of the evidence presented at the probable cause hearing was used against the defendant at trial, and there was sufficient evidence for the bindover.[65]

In *State v Brown*, the defendant claimed that lack of counsel at his probable cause hearing prejudiced him because the state's witness was not cross-examined at the hearing, resulting in the loss of impeachment evidence that could have been used at trial. The Supreme Court of Connecticut applied harmless error analysis, and found that the error was harmless. The Court recognized that "[t]he denial of this constitutional right, while significant, as is every constitutional violation, does not constitute the type of constitutional error that requires automatic reversal..."[66] The Court noted that there were no significant inconsistencies in the witness's testimony at the probable cause hearing, and in any event, the transcript from the preliminary examination was available at trial.[67]

In *Commonwealth v Carver*, the defendant was unrepresented at his preliminary hearing, and was identified by two witnesses. The identification evidence from the preliminary hearing was not introduced at trial. The Court applied harmless error analysis, and held that the error was harmless. The Court found that there was a sufficient independent basis for the in-court identifications and therefore there was no prejudice to the defendant.[68]

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[65]*Id* at 302.

[66]*State v Brown*, 279 Conn 493, 509-513 (2006).

[67]*Id* at 512-513.

[68]*Commonwealth v Carver*, 292 Pa Super 177, 180-182 (1981).

In *Norton v State*, the Court of Criminal Appeals of Oklahoma held that the denial of counsel at a preliminary hearing is subject to harmless error review pursuant to *Coleman.*[69] The Court pointed out that since the preliminary examination itself could be waived, it would make no sense to hold that a denial of counsel at the preliminary hearing requires automatic reversal: "Clearly, the right to a preliminary hearing at all is no less important than the right to counsel at that hearing."[70]

All of the courts agree that the preliminary examination is a critical stage for purposes of the Sixth Amendment right to counsel. But a denial of the right to counsel at this stage is not structural unless it somehow contributes to a guilty verdict at trial. In the instant case, there was no evidence produced at defendant's preliminary examination that was later used against him at trial. The same witnesses who testified at the examination testified at trial and were subject to cross-examination. The evidence that was produced at the examination was sufficient to support the bindover and, had defendant been represented, the outcome would have been the same. Lastly, defendant was represented by counsel throughout the entirety of his trial and was found guilty beyond a reasonable doubt.

Therefore, the Court of Appeals erred when it determined that the denial of counsel at defendant's preliminary examination was a structural error requiring automatic reversal.

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[69]*Norton v State*, 43 P3d 404, 408 (Okla Crim App 2002) (overruling *Cleek v State*, 748 P2d 39 (Okla Crim App 1987)).

[70]*Id*.

RELIEF

THEREFORE, the People request this Honorable Court to grant the People's application for leave to appeal, or peremptorily reverse the Court of Appeals decision and affirm defendant's convictions and sentence.

Respectfully submitted,

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